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No. 06-1037

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In The
Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY, AND JEFFERSON COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE RETIREMENT ADMINISTRATORS ("NASRA") AND THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS ("NCPERS") AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Petitioners have asked this court to grant a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals, *en banc*, as to whether the use of "age" as a factor in a state retirement plan renders the plan facially discriminatory under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*.

SUPREME COURT RULE 29.6
CORPORATE DISCLOSURE STATEMENT

The National Conference on Public Employee Retirement Systems (NCPERS) pursuant to Supreme Court Rule 29.6 files this "Corporate Disclosure Statement" and shows that it has no parent corporation and no publicly held company owns 10% or more of its stock.

The National Association of State Retirement Administrators (NASRA) pursuant to Supreme Court Rule 29.6 files this "Corporate Disclosure Statement" and shows that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*[1]

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS") and the National Association of State Retirement Administrators (hereinafter "NASRA") are national organizations focused on the preservation, growth and stability of public pension plans and funds. The decision of the Sixth Circuit Court of Appeals in *EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006) undermines and frustrates these goals.

NASRA is a non-profit association whose members are the directors of this nation's state, territorial and largest statewide public retirement systems. These systems hold nearly two trillion dollars in assets that provide pension and other benefits to more than two-thirds of all state and local government employees. In addition to its membership, NASRA also has approximately 200 associate members. Associate members are private sector firms that work with governmental retirement systems.

Among other functions, NASRA maintains a standing survey of key characteristics of public retirement systems

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[1] The parties have consented to the filing of this brief and letters reflecting that consent have been filed with the Clerk of the Supreme Court as required by Supreme Court Rule 37.2. Further as required by Supreme Court Rule 37.6, counsel certifies that this Brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae*, their members or undersigned counsel made a monetary contribution to the preparation or submission of this Brief. It should be noted that Robert D. Klausner, counsel of record for the Petitioners, is general counsel to *Amici*, NCPERS and NASRA. However, he did not participate in the preparation or submission of this Brief or make any monetary contribution toward its submission or preparation.

and maintains a clearinghouse of information and resources pertinent to public retirement administration and policy.[2]

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS") is the largest national non-profit public pension advocacy organization, representing over 500 governmental pension funds having assets in excess of two trillion dollars. NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee education and providing essential pension information to trustees, administrators and public officials.[3]

Amici and their member funds representing significant assets and millions of citizens have an interest in this matter and will be adversely affected by the decision rendered by the Sixth Circuit *en banc* in this case. The circuit court's determination ultimately broadens the scope of the ADEA as it affects state and local governmental pension plans and will inevitably lead to additional litigation and concomitant expense in designing, preserving and protecting public pension funds. Likewise, as a result of the decision, member plans may be forced to modify or reduce retirement benefits to millions of public employees nationwide in conflict with state constitutional guarantees.

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[2] General information concerning NASRA as well as specific data regarding its activities can be found at its website, www.nasra.org.

[3] General information concerning NCPERS as well as specific data regarding its activities can be found at its website, www.ncpers.org.

SUMMARY OF ARGUMENT

The issues presented in this case merit review by this Court as: (1) the decision of the Sixth Circuit will lead to instability in the design, management and protection of public retirement funds; (2) under the *en banc* analysis virtually all pension plans would be "on their face" discriminatory solely because they contain a reference to "age"; (3) the Sixth Circuit's analysis is contrary to this Court's decision in *Hazen;* (4) the decision has widespread adverse fiscal implications; and (5) the decision violates principles of federalism.

If the Writ is not granted, the nation's state and local retirement systems will be forced to act to their detriment based merely on the denial of the Motion for Summary Judgment. This court should grant the Petition for Writ of Certiorari to address these issues now in order to forestall the otherwise inevitable adverse reaction of the states to the Sixth Circuit's decision. Further, as the Sixth Circuit *en banc* decision is contrary to this Court's analysis of "disparate treatment" cases under the ADEA, review is proper under Supreme Court Rule 10.

ARGUMENT

1. THE DECISION OF THE SIXTH CIRCUIT WILL LEAD TO INSTABILITY IN THE DESIGN, MANAGEMENT AND PROTECTION OF PUBLIC RETIREMENT FUNDS.

There are more than 20 million working and retired state and local government employees in the United States. Retired public employees live in virtually every city and town in the nation (90% retire and remain in the

same jurisdiction where they worked). Active public employees comprise more than 10% of the nation's workforce and two-thirds are employed in education, public safety, corrections and the judiciary. Retention of experienced and trained personnel in these positions is critical to the continuous and reliable delivery of public services.[4]

Public pension plans distribute more than $140 billion annually (an amount greater than the total economic output of 22 states) in benefits to nearly seven million retirees, beneficiaries and other recipients with an average pension benefit of roughly $20,400 annually. These payments are steady and continuous and provide a robust economic stimulus to local economies throughout the nation. Studies indicate that public pension funds and the benefits they distribute make important contributions to the local, state and national economies. Likewise, the assets of these plans are an important source of liquidity and stability for the nation's financial markets.[5]

Further, while private sector plans are subject to federal regulation through ERISA, state and local governmental plans are creatures of state constitutional, statutory and case law. These governmental plans must comply with a vast landscape of state and local requirements as well as industry accounting standards. These plans are accountable to the legislative and executive branches of the state; independent boards of trustees that

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[4] Data and statistics obtained from NASRA are generally available through its website at www.nasra.org. *See*, generally, the resources section of NASRA website. The site also has available general statistics and studies regarding retirees and retirement systems across the nation.

[5] *See*, Footnote 4, *supra*.

include employee representatives; and ultimately the taxpaying public.[6]

The Sixth Circuit's finding that a public retirement plan is facially discriminatory simply because it considers age as a correlating factor in its retirement benefit formula undermines the funding and benefit framework of the nation's public pension plans. These public pension plans, upon which millions of retirees and their beneficiaries depend, will be subjected to great instability as the decision will: (1) upset the actuarial assumptions on which the states make funding decisions; (2) lead to huge expenses in designing, managing and protecting these plans; (3) require fundamental constitutional changes in virtually every state in the U.S.; and (4) foster uncertainty in the national financial markets as the plans attempt to discern the status of the law and come into compliance with it.

The Sixth Circuit's decision may also open the floodgates for a multitude of claims which could cripple retirement programs. The EEOC in the case now under consideration has sought damages including back benefits with pre-judgment interest dating to 1992. If the thousands of public pension plans nationwide are now subject to suit, literally billions of dollars of state and local pension funds will be at risk. Public pension plans should not be thrown open to scrutiny and found discriminatory simply because "age" is utilized as a factor in the plan. Clearly, the failure by this Court to grant this writ could have catastrophic and destabilizing results.

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[6] *See*, Footnote 4, *supra*.

2. THE USE OF "AGE" AS A FACTOR IN A RETIREMENT PLAN DOES NOT RENDER THE PLAN DISCRIMINATORY UNDER THE ADEA.

The *en banc* decision of the Sixth Circuit finds that a Kentucky retirement plan is "facially discriminatory" simply because "age" is a factor in determining eligibility for a disability pension under the plan.[7] The ruling will in effect force retirement plans across the nation to review and re-design their retirement plans. Further, the review and re-design will be no easy task as (1) most pension plan benefits are guaranteed in the state's constitution; and (2) the plan can make no reference to age without such reference being deemed "facially discriminatory," making actuarial analysis virtually impossible. Thus, under the "disparate treatment" analysis used by the Sixth Circuit, virtually all plans would be facially discriminatory as the mere reference to age in a retirement plan will establish a "prima facie" case of age discrimination under the ADEA.

The Sixth Circuit's ruling threatens all pension plans, in as much as all use "age" as a factor in determining retirement eligibility. Clearly, the ADEA, even as amended by the OWBPA in 1990, permits the establishment of a normal retirement age. Further, age is always a factor in establishing retirement eligibility, along with years of service and the kind or type of service rendered.

Ironically, the effect of the Sixth Circuit's decision will be to harm older workers. Under the Kentucky plan at issue in this case, a hazardous duty worker is vested and eligible to retire after reaching age 55 with five (5) years of

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[7] The worker in this case was eligible for normal retirement benefits based on his age and years of service.

service. If Kentucky is forced to modify its plan and revert to a straight "years of service" formula, workers who begin work later in life will never receive a pension because actuarily it would be cost prohibitive to provide retirement benefits to all workers with five (5) years of service who retire at any age.

The Kentucky formula actually encourages the hiring of older workers, consistent with the congressionally stated purpose of the ADEA, because the older workers, even with limited service, can still receive a pension. Under a strict "years of service" formula (with no allowance for reference to age) it would be financially impossible to offer a lifetime pension to workers who begin service late in life, because it is not possible to offer a younger worker with five (5) years of service a similar lifetime pension.

This Court should grant the writ application to review and consider the practical effect of the Sixth Circuit's decision, which is to eliminate pension benefits for millions of workers who begin public service late in life.

3. THE SIXTH CIRCUIT DECISION IS CONTRARY TO THE HOLDING OF THIS COURT IN *HAZEN*.[8]

The Sixth Circuit analyzes this case as one of "disparate treatment" not one of disparate impact.[9] The Sixth

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[8] *Hazen Paper v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

[9] Under *Hazen*, in "disparate treatment" cases liability depends on whether the protected trait, i.e. age, actually motivated the employer's decision. In other words, the protected trait (age) must have actually played a role in and had a determinative influence on the employer's decision. In contrast, "disparate impact" claims under the ADEA may be

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Circuit *en banc* found the Kentucky plan to be "facially discriminatory" so that no additional proof of discriminatory intent or motive was necessary, as motive and intent were directly evidenced by the facially discriminatory nature of the policy itself. *See,* 467 F.3d at 578-579, 580-582.(The decision is also included in the "Appendix" to Petitioner's Brief.) More importantly, the Sixth Circuit *en banc* decision holds that "an employer's intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy."[10] 467 F.3d at 580.

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established without demonstration of discriminatory motive or intent. *See, Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). Disparate treatment and disparate impact cases are fundamentally different. As Justice O'Connor wrote in *Hazen*, this Court "has long distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." 507 U.S. at 607.

In the instant case, the EEOC has alleged a "disparate treatment" claim under the ADEA. Nonetheless, the Sixth Circuit has applied a "disparate impact" analysis to this "disparate treatment" claim. *Smith*, in which this Court first recognized ADEA "disparate impact" claims, recognizes that an employer has defenses in "disparate impact" cases and may base his decision or plan on "reasonable factors other than age." *See*, 29 U.S.C. § 623(f)(1). Even utilizing a "disparate impact" analysis, Kentucky put forth sufficient evidence to establish a Reasonable Factors Other than Age ("RFOA") defense, which evidence the Sixth Circuit erroneously disallowed or ignored.

[10] It is unclear from the Sixth Circuit *en banc* decision whether the burden of production, burden of proof or burden of persuasion in an ADEA "disparate treatment" case has been affected. Petitioners in connection with their Motion for Summary Judgment put forth sufficient evidence to demonstrate that there were legitimate "factors other than age" which were considered in establishing the disability and regular retirement plans and in establishing the participants' eligibility criteria and requirements. As Chief Judge Botts notes in the dissent, age was merely a correlating factor in establishing eligibility, not the motivating factor. Despite this showing by Petitioners, the *en banc* panel held there was a "prima facie" showing of discrimination

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The decision is in direct conflict with *Hazen* where this Court stated:

> in a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment to employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."

Hazen, 507 U.S. at 609 (citations omitted).

In this case, it appears that age was nothing more than an incidental or correlating factor. It was not the motivating factor for the Kentucky plan. As the District Court noted in its granting of Summary Judgment and dismissal of the EEOC complaint: "Again, age will always be a factor in retirement plans. The fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a

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(which was apparently unrebutted by the Petitioner's evidence). Accordingly, the Sixth Circuit remanded the matter to the District Court for further consideration. To the extent the *en banc* decision may affect and upset long lines of decisions of other Circuits and this Court regarding available defenses, burden of proof, burden of production or the burden of persuasion in ADEA "disparate treatment" claims, this Court should grant the Petitioner's writ application in order to consider and clarify the issue.

mask used to hide discrimination."[11] For the Sixth Circuit to find the plan facially discriminatory violates the "disparate treatment" analysis laid out by this Court in *Hazen*. Neither the intent nor the letter of the ADEA is violated by a retirement plan's making reference to age when this is merely a correlating factor or an actuarial reality. This court should grant the writ application in accordance with Supreme Court Rule 10 to insure the decision conforms to its holding in *Hazen* and other "disparate treatment" cases under the ADEA.

4. THIS COURT SHOULD CONSIDER THE ADVERSE FISCAL CONSIDERATIONS WHICH FLOW FROM THE DECISION.

The Sixth Circuit in the instant matter seems concerned that Kentucky engages in the typical practice of not permitting persons who have already reached normal retirement age to receive disability benefits. Many plans nationwide actually convert disability retirees to normal retirement status upon attainment of normal retirement age, provided that no reduction in benefit payments occurs.

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[11] *See*, "Order" of the United States District Court for the Western District of Kentucky, filed September 3, 2003, Granting Kentucky's Motion for Summary Judgment and Dismissing the EEOC complaint. The "Order" is attached as an "Appendix" to Petitioner's Brief and the quote is from page 46a as contained in the Appendix. *See also, Lyon v. Ohio Education Ass'n and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995) which found that imputation of service years in a retirement plan was not discriminatory but a reflection of an "actuarial reality." *Id.* at 140. The *en banc* decision from which Petitioner's seek review partially overrules *Lyon*.

This practice is consistent with the purpose of disability benefits, particularly for public safety employees injured in the course and scope of hazardous duty. Without disability benefits, public safety officers injured on the job would be unable to survive financially until normal retirement age. Disability payments thus provide a needed bridge from active paid service to normal retirement.

The ADEA as amended by the OWBPA specifically permits states to establish a normal retirement age. Further, Congress has recognized that public servants in hazardous duty situations may have a lower retirement age than regular state employees and as a result has seen fit to eliminate the Internal Revenue Code Section 72t penalty for early withdrawal from retirement plans for public safety officers who retire after age 50. For regular employees, the Congress has set normal retirement age for the 72t penalty at 59½, or age 55 in the case of a separation from service.

Similarly, Congress has seen fit to tax disability benefits differently from normal retirement benefits. While the latter are generally taxable as ordinary income, the former are exempt from tax under IRC section 105. Forcing states to provide disability benefits in lieu of normal retirement benefits after a worker reaches normal retirement age will have a direct negative effect on the public fisc, contrary to the express intent of Congress.

Thus, aside from the fiscal impact of the Sixth Circuit decision on the states, the decision affects the federal treasury as well.

5. THE SIXTH CIRCUIT DECISION VIOLATES PRINCIPLES OF FEDERALISM.

The ADEA defines an "employer" to include a state and a political subdivision of a state but not the United States. 29 U.S.C. § 630(b). However, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), this Court held that although Congress intended the ADEA to abrogate the States' Eleventh Amendment immunity, this abrogation exceeded Congress' authority under the Fourteenth Amendment. Specifically, this Court held that Congress could not impose certain substantive requirements on state and local governments when such requirements were disproportionate to any unconstitutional conduct which could be targeted under the ADEA.[12]

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), a 1989 decision of this Court, was legislatively modified by the OWBPA on the limited finding of Congress that younger workers could not be afforded a specific benefit which was not available to older workers. Contrary to the implied finding of the Sixth Circuit, OWBPA does not generally abrogate well established principles of federalism which discourage the federal government from

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[12] *Kimel* is an important decision in recognizing, upholding and furthering the principles of federalism. The decision centers on the Court's review of the Congressional intent and purpose in passing the ADEA and the power of Congress to abrogate the States' sovereign immunity under the Eleventh and Fourteenth Amendments to the United States Constitution. The Court ultimately held the ADEA's abrogation of state immunity invalid under Section 5 of the Fourteenth Amendment by disallowing suits against states by individuals under the ADEA in federal court.

interfering with the traditional police powers reserved to the states.

The decision of the Sixth Circuit turns federalism on its head and forces the states to show that their policies in the traditional area of state law enforcement do not violate non-binding guidelines issued by the EEOC.[13] This is an area which has always been strictly construed in favor of the states, and this Court has never gone so far as to abrogate state sovereignty in favor of a federal agency's guidelines which have not attained the force of law.

The Tenth Amendment to the United States Constitution confirms the state's status as a sovereign. In deference to the sovereignty of the state, the federal government can neither: "issue directives requiring the states to address particular problems nor command the state's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."

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[13] It is clear the EEOC has rule making authority under the ADEA. However, rather than engaging in rulemaking, the EEOC issues "guidelines" concerning the interpretation of and compliance with the ADEA. In the instant case, the EEOC filed suit against Kentucky in 1999 and issued a "policy manual" in 2000 in which the EEOC criticized Kentucky for being out of compliance with EEOC guidelines. However, ADEA guidelines as issued by the EEOC are only statements of EEOC policy and do not comply with the legal requirements for rulemaking. The force and effect of such guidelines is merely a function of their persuasive effect. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000). Further, no deference is due to agency interpretations at odds with the plain language of the statute itself. The EEOC brought suit against Kentucky based solely on a then-unissued EEOC staff interpretation of an ADEA provision, in a transparent attempt to bully the sovereign State of Kentucky into adopting the EEOC's staff interpretation of the law, without any true law making, formal publication or opportunity for public comment. This is directly at odds with the proper functioning of our federal system.

Printz v. United States, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).[14]

Through its enforcement actions, guidelines and advisory directives, the EEOC has sought in this and other enforcement actions to dictate to the states how to design and structure their public retirement plans. This is an affront to federalism principles embodied in the Tenth Amendment to the U.S. Constitution. Likewise, the efforts of the EEOC undermine and frustrate a vast array of state constitutional and legislative provisions specifically involved with the establishment, design, funding and maintenance of these public retirement systems. The employment and payment of state officers enforcing the plenary police powers of a state is paramount to the sovereignty of that state.

The power of a state to regulate its own citizenry and to regulate relationships with its own employees and retirees is essential element of our system of federalism. Congress recognized this in exempting public retirement plans from the scope of ERISA in 1974.[15]

Likewise, this Court should strictly scrutinize decisions expanding the scope and application of the ADEA as

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[14] In *Printz*, this Court found that the obligation to conduct background checks imposed on sheriff's by a federal gun law (the Brady Bill) was unconstitutional as it required the states to administer a federal regulatory program. Specifically, the law was violative of the principles of dual sovereignty established and contained in the U.S. constitution.

[15] *See*, 29 U.S.C. § 1003(b)(1).

it affects public retirement systems and particularly plan design and participant eligibility.

CONCLUSION

For the above and foregoing reasons, *Amici Curiae* urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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